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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY R. MACDONALD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) [1] is reported at 531 F. 2d 196. The order of the court of appeals (Pet. App. A) denying the government's petition for rehearing, with a suggestion for rehearing *en banc*, is unreported. The opinion and order of the district court denying respondent's motion to dismiss the indictment (Pet. App. D) are unreported.

[1] "Pet. App." refers to the separately-bound appendix to this petition.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1976. A timely petition for rehearing, with a suggestion for rehearing *en banc*, was denied on April 30, 1976. On May 26, 1976, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including June 29, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a pretrial order declining to dismiss an indictment on speedy trial grounds may be appealed by the defendant prior to trial.

2. Whether respondent was deprived of his Sixth Amendment right to a speedy trial.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *.

28 U.S.C. 1291 provides in pertinent part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *.

STATEMENT

Respondent was charged with the first-degree murder of his wife and two daughters, in violation of 18 U.S.C. 1111, in an indictment returned on January 24, 1975, by a grand jury of the United States District

Court for the Eastern District of North Carolina. On July 28, 1975, the district court denied respondent's motions to suppress evidence and to dismiss the indictment (Pet. App. 44a–50a). Respondent appealed, and the government moved to dismiss the appeal for lack of jurisdiction. On August 15, 1975 (three days before trial was scheduled to begin), the court of appeals entered an order permitting the appeal and staying respondent's trial (Pet. App. 42a–43a). On January 23, 1976, the court of appeals reversed and remanded with directions to dismiss the indictment on the ground that respondent had been denied his Sixth Amendment right to a speedy trial (Pet. App. 3a–28a).

1. In the early morning of February 17, 1970, respondent's pregnant wife, Colette, and his two daughters, Kimberly and Kristen, aged five and two, were bludgeoned and stabbed to death at respondent's quarters on the Fort Bragg military reservation in North Carolina. Respondent, a Captain in the Army Medical Corps assigned to the "Green Berets," telephoned the military police at 3:40 a.m. for assistance (A.615).[2] Clad only in his blue pajama bottoms,

[2] "A." refers to the appendix to respondent's brief in the court of appeals, a copy of which is being lodged with the Clerk of this Court. The summarized testimony of the witnesses at the Army Article 32 investigation, prepared by the investigating officer, appears at A.615–652. As reflected in the index found at A.666, the verbatim transcripts are referred to as exhibits E–1 to E–57. References to the verbatim record rather than to the summary will be cited by the pages of the transcript (*e.g.*, E–1, at 5). Documentary exhibits are indexed at A.581–586 and A.656–662. Government exhibits are referred to by the letter "G" and defense exhibits by the letter "D."

respondent informed the police that he and his family had been attacked by four assailants (G–4, at 1). Shortly thereafter, Army Criminal Investigation Detachment (C.I.D.) Duty Agent William F. Ivory arrived at the scene as respondent was being removed to the hospital. Agent Ivory walked through the apartment, observing the bodies and the blood-stained walls and floors (E–21, at 632–637); he removed a torn and bloody blue pajama top that had been draped on the chest of respondent's wife and a Hilton bathmat that was resting on her abdomen (A.628).

As the body of respondent's wife was being lifted from the floor of the master bedroom onto a stretcher, Agent Ivory noticed a blue thread adhering to a clot of blood on the rug where her head had rested. This discovery prompted a search by C.I.D. personnel for other blue threads and yarns inside and outside respondent's quarters. More than one hundred blue threads and yarns, identical to those of respondent's blue pajama top, were ultimately collected from various rooms in and from the area immediately outside the house: more than 70, including approximately 30 from the spot where the body of respondent's wife had been found, were discovered in the master bedroom; 19 were uncovered from the bedding in which Kimberly's body had been wrapped; three were removed from Kristen's bedding; two were taken from a wooden club lying just outside the utility room door; significantly, no threads were found in the living room where respondent claimed that he had been violently

attacked and that his pajama top had been torn (A.628–629; E–3, at 400; E–21, at 657; G–7; G–20; G–21; G–22; G–24; G–26).

The bodies of respondent's wife and children were immediately autopsied (A.625–626). Pathologists determined that although Colette and Kimberly had sustained severe blunt trauma injuries to the head before death, all of the victims had died from multiple deep penetrating stab wounds.[3] It was also determined that respondent and each of the victims had a different blood type, thus facilitating the investigators' recreation of the murders and of respondent's movements. Furthermore, C.I.D. agents and laboratory technicians engaged in a painstaking analysis of the crime scene over five continuous days, photographing, dusting, and collecting all real evidence found in respondent's quarters (G–98; D–25; D–26; D–27).

Respondent was interviewed by several law enforcement officers on the morning and afternoon following the murders. He reported that at least four intruders had entered his home, that the assailants had encountered him in his living room and had struck him with a bludgeon, that he had heard his wife and older daughter screaming but had lost consciousness, and that when he awoke he had found his family dead (G–76, at 1–5). Respondent also provided a detailed account of his actions upon discovering the bodies, including the statement that he had removed his pa-

[3] Respondent's wife had suffered 16 elliptical stab wounds and 21 puncture wounds to the chest (A.625).

jama top and had covered his wife's body with it and with a Hilton towel (G–76, at 3; G–101, at 4–9).

By April 6, 1970, after an intensive but incomplete investigation had been conducted, it had become apparent to C.I.D. agents that many aspects of respondent's version of the attack and of his actions after regaining consciousness were inconsistent with the laboratory analysis of the physical evidence. For example, although respondent alleged that he had been stabbed in the right chest, and although he had in fact suffered an incision and a partially collapsed right lung (A.621), there was no hole in the right front portion of his pajama top to correspond to that wound (G–74); although respondent had not sustained any stab wounds to his back (D–28), more than 30 punctures were visible on the rear panels of his pajama top (G–19); although respondent alleged that he had been violently assaulted in his living room (G–76, at 2; G–101, at 4), no seam threads or fabric yarns from his pajamas were uncovered in a minute, pile-by-pile examination of the living room rug (G–7; E–21, at 661); although respondent alleged that he had been attacked with a wooden club (G–101, at 1), no splinters from the club were found in the living room despite the fact that they were discovered in the bedrooms (E–21, at 400), nor was there any trace of blood on the couch, walls, floor or rug in the area of his alleged attack (G–7; G–24; E–8, at 447, 469–470); although respondent alleged that he had not been wearing his pajama top when he inspected Kimber-

ly's body (G–101, at 7), the garment bore stains of Kimberly's blood (G–7); although respondent alleged that his pajama top had been torn in a struggle in the living room (G–101, at 4), the pocket of the pajama top was found near his wife's body in the master bedroom (E–21, at 660) and flecks of Colette's blood were discovered on the pocket of the pajama (G–7); and although respondent alleged that he had not been wearing his eyeglasses either when assaulted or at any time thereafter (G–101), investigators found his glasses lying on the floor of the living room, with Kristen's blood on the surface of the lens touching the floor.

Based on these and other discrepancies in his story and on additional evidence, respondent was advised of his rights on April 6 and was warned that he was a suspect. Later on that day, respondent's immediate commander, Col. Francis B. Kane, Jr., relieved respondent of his medical duties and restricted him to the military reservation on condition that he be escorted by another officer when not in his quarters. Several weeks thereafter, on May 1, 1970, Col. Kane formally preferred criminal charges against respondent, pursuant to Article 30 of the Uniform Code of Military Justice, 10 U.S.C. 830 (Pet. App. 7a).

As required by Article 32 of the U.C.M.J., 10 U.S.C. 832,[4] an Investigating Officer, Col. Warren V.

[4] Article 32, U.C.M.J., 10 U.S.C. 832, provides:

"(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This in-

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Rock, was appointed to investigate the matter and to recommend whether the charges (three specifications of murder, in violation of Article 118 of the U.C.M.J., 10 U.S.C. 918) should be referred by the General Court-Martial Convening Authority (the post commander) to a general court-martial for trial. At the hearing held pursuant to Article 32, the government presented 27 witnesses and respondent 29, the ma-

vestigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

"(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel is reasonably available, or by counsel detailed by the officer exercising general court-martial jurisdiction over the command. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

"(c) If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination and presentation prescribed in subsection (b), no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.

"(d) The requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error."

jority of whom were character witnesses. Respondent also testified, repeating his previous recollection of the events of February 17, 1970, including the assertion that his pajama top had been ripped in the living room by his assailants and that he had placed it on his wife's chest upon finding her body in the master bedroom (Pet. App. 7a–8a; A.643).

At the conclusion of the Article 32 proceeding, Col. Rock filed a report recommending that the charges against respondent be dismissed but that further investigation of the crime by the appropriate civilian authorities be undertaken (Pet. App. 8a). This recommendation was forwarded to Maj. Gen. Edward M. Flanagan, Jr., Commanding General of the unit to which respondent was assigned, who on October 23, 1970, dismissed the charges because of insufficient evidence available to justify their reference to trial by court-martial (*ibid.*). See ***Manual for Courts-Martial, United States*** ¶ 33f (Rev. ed. 1969). In December 1970, the Army granted respondent an honorable discharge for reasons of hardship.

2. Following respondent's release from the military, the Department of Justice requested the C.I.D. to continue its investigation. During the ensuing year, the C.I.D. conducted a total of 699 interviews or reinterviews in 30 states and several foreign countries (Pet. App. 9a). In addition to following leads furnished by respondent and others, the C.I.D. engaged in numerous forensic tests, including a comprehensive effort to identify all foreign objects found at the scene of the crime (*e.g.*, hairs and fibers, fingerprints, paint, wood, knives, wax). These investigative efforts

were recounted in a massive, thirteen-volume report, which was transmitted to the Department in June 1972. After the raw report had been examined by several persons within the Department,[5] the C.I.D. was requested to investigate undeveloped and newly-developed leads. After additional interviews and scientific tests, the C.I.D. forwarded supplemental reports on November 9, 1972, and August 20, 1973 (Pet. App. 9a).

In late May 1974, after further study, the government determined that many unanswered questions in the complex case could only be resolved by use of the broad investigative powers of the grand jury. Therefore, in August 1974, a grand jury of the United States District Court for the Eastern District of North Carolina was impanelled to investigate the murders fully. During the next several months, some 75 witnesses, including respondent, were called to testify, while the F.B.I. undertook an extensive reinvestigation of the crime that included exhumation of the victims to obtain hair samples.[6] This renewed inquiry established that there was probable cause to believe that respondent had killed his family and had staged the murder scene to cover up his crime (Pet App. 7a, 9a).

3. Respondent was indicted for the murders on

[5] Contrary to the court of appeals' statement (Pet. App. 9a), the C.I.D. report recommended not respondent's prosecution but further investigation.

[6] The grand jurors also inspected respondent's quarters on Fort Bragg, where the murders occurred. These quarters were seized on February 17, 1970, and have remained sealed to this day.

January 24, 1975. On July 28, 1975, the district court denied respondent's pretrial motions to dismiss the indictment on several grounds, including double jeopardy and denial of a speedy trial.[7] Relying on *United States* v. *Marion*, 404 U.S. 307, the court concluded (Pet. App. 49a) that "[t]he right to a speedy trial under the Sixth Amendment does not arise until a person has been 'accused' of a crime, and in this case this did not occur until the indictment had been returned."

The court of appeals, with one judge dissenting, reversed and remanded with directions to dismiss the indictment. Although recognizing that interlocutory orders in criminal cases are generally not appealable, the court, relying upon its decision in *United States* v. *Lansdown*, 460 F. 2d 164, held that post-trial consideration of respondent's double jeopardy claim "could provide only inadequate relief because the double jeopardy prohibition was intended to prevent the hardship of undergoing a second trial" (Pet. App. 5a). In addition, the court held that respondent's speedy trial claim was a proper subject for interlocutory review because it involved "a fundamental constitutional right," was "[p]endent to the double jeopardy claim, and closely related to it," and could

[7] On May 30, 1975, the district court had denied respondent's motion for a change of venue to the Central District of California. The court of appeals dismissed respondent's appeal from this order (C.A. 4, No. 75-1621, decided July 1, 1975, certiorari denied, 423 U.S. 926) and denied his petition for a writ of mandamus to compel the district court to grant the change of venue (C.A. 4, No. 75-1681, decided July 15, 1975, certiorari denied, 423 U.S. 927).

"be decided without considering the merits of the charges against [respondent]" (*ibid.*).[8]

On the merits, the court of appeals concluded that respondent had been denied his Sixth Amendment right to a speedy trial. The court viewed Col. Kane's preferral of criminal charges against respondent in May 1970, and the contemporaneous restriction of respondent's liberties, as "the functional equivalent of a civilian arrest warrant." It concluded that the protections afforded by the Sixth Amendment were activated as of that date and that the delay of more than four and one-half years between respondent's accusation and his indictment was of sufficient length to require application of the balancing analysis outlined in *Barker* v. *Wingo,* 407 U.S. 514 (Pet. App. 13a–20a). Although the court of appeals conceded that the government had not deliberately delayed in order to hamper the defense, it nevertheless determined that at least two years of the delay were attributable either to "indifference, negligence, or ineptitude" (*id.* at 23a), that respondent had "consistently expressed a desire to have the case resolved" and had "reasonably asserted his right to a speedy trial" (*id.* at 24a), and that respondent had been prejudiced by the delay because he "has had to live with the constant threat of a new prosecution," "has been required to

[8] The court also ruled that in view of its acceptance of the appeal on the double jeopardy and speedy trial issues, it would consider as well the other questions that respondent had sought to appeal (composition of the grand jury, alleged prosecutorial misconduct, discovery, and suppression of evidence), since those questions, "if not now presented, might occasion further delay in terminating this litigation" (Pet. App. 4a, n. 3).

retain counsel at his own expense, and * * * has suffered anxiety concerning the unresolved nature of the case." Finally, the court stated, without specifying particulars, that "in the five years since the murders, memories have faded and witnesses can no longer be expected to reliably recall details" (*id.* at 25a).

Judge Craven dissented. He disputed the court's conclusion that respondent had been subjected to the civilian equivalent of an arrest in May 1970, finding that the Army's inquiry fell "somewhere between an unsuccessful presentation to a grand jury and an arrest and subsequent release because of a failure to demonstrate probable cause for the arrest," neither of which "warrants an application of the sixth amendment's speedy trial guarantee" (Pet. App. 32a). In any event, Judge Craven reasoned that since all military charges against respondent had been dismissed in October 1970, and since respondent had "stood under no 'public accusation' " or other disability during the four-year period prior to his indictment, the majority's conclusion that respondent's right to a speedy trial continued unabated from May 1970 until the return of the indictment was unsupportable (*id.* at 32a–38a). Judge Craven viewed respondent's claim as one of pre-indictment delay, which he found unpersuasive in the absence of concrete evidence of actual prejudice to respondent (*id.* at 40a–41a).[9]

[9] On April 30, 1976, the court of appeals denied the government's petition for rehearing *en banc* by a 3–3 vote. Chief Judge Haynsworth, Judge Craven and Judge Widener would have granted rehearing "for the reasons stated in Judge Craven's dissenting opinion" (Pet. App. 2a).

REASONS FOR GRANTING THE WRIT

1. The question whether the courts of appeals have jurisdiction under 28 U.S.C. 1291 to hear interlocutory appeals in criminal cases is one that this Court has already determined to be of sufficient importance to warrant its attention. *Abney* v. *United States*, No. 75–6521, certiorari granted, June 14, 1976, presents the question whether a pretrial order declining to dismiss an indictment on double jeopardy grounds may be appealed by the defendant prior to trial.

Our memoranda in *Abney* and in *Barket* v. *United States*, No. 75–1280, which raises the identical issue, set forth the reasons why 28 U.S.C. 1291 should not be construed to permit appeal of interlocutory orders in criminal cases.[10] We recognized, however, that since one of the primary interests protected by the Double Jeopardy Clause is avoidance of the trial itself, there may be plausible arguments why a limited exception to the general principle of nonappealability should be countenanced for such claims. While we believe that these contentions are outweighed by other jurisprudential considerations, elaborated in our memorandum in *Barket*, that militate against allowing a piecemeal appeal, double jeopardy orders may nevertheless present a unique aspect of the more general problem illustrated by this case. Indeed, the instant case is an apt example of our observation in *Barket* (Memorandum at 13 and n. 16) that once pretrial appellate review of double jeopardy claims is accepted, some

[10] We are providing respondent's counsel with a copy of our memoranda in these cases.

courts may be quick to extend the practice beyond cases involving only that particular constitutional provision.

This case, then, presents an opportunity for the Court to consider the vexing and important question of the propriety of interlocutory criminal appeals in a context not complicated by the special circumstances that may obtain in cases involving double jeopardy claims.[11] The protections afforded by the Sixth Amendment would not be "lost, probably irreparably" (*Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546) unless the validity of the claim were determined prior to trial. The speedy trial provision is unique among the provisions of the Bill of Rights in that it is as much designed to foster the interests of society in the expeditious disposition of pending criminal charges as to confer protection upon individual defendants. *Barker* v. *Wingo, supra*, 407 U.S. at 519–522. Furthermore, the individual interest that is implicated by the provision is not the avoidance of any trial, but the diminution of the risk of conviction based on memories dimmed by the passage of time (see *United States* v. *Ewell*, 383 U.S. 116, 120), plus the interest, shared with society at large, that pending accusations be resolved with due expedition. This complex of interests is fully served by reversal of any conviction procured after a period of unconstitutional

[11] Although the court of appeals termed respondent's Sixth Amendment claim as "pendent" to his double jeopardy claim (Pet. App. 5a), it viewed both as independently appealable prior to trial. This conclusion is supported by the court's determination not to address respondent's claim of double jeopardy in light of its disposition of the case (*id.* at 28a).

delay; accordingly, no policies would justify allowance of interlocutory appeals in cases of this type. Moreover, the analysis required of an appellate tribunal when a speedy trial claim has been raised is most effectively accomplished after a complete presentation of the facts. See *Barker* v. *Wingo, supra,* 407 U.S. at 530–532.

Review of the jurisdictional issue in this case is therefore clearly warranted in light of *Abney*. If the Court rules that the pretrial order in *Abney* is not appealable, it would of course follow that the court of appeals lacked jurisdiction to determine respondent's interlocutory appeal. If, however, the Court holds that the denial of a motion to dismiss on double jeopardy grounds is subject to review prior to trial, this case affords an excellent vehicle in which to explore whether that principle of interlocutory appeal in criminal cases should be extended to other types of claims that, if accepted, would bar a defendant's prosecution.[12]

[12] The court of appeals purported to assume jurisdiction over respondent's appeal because of "the extraordinary nature of [his] case" (Pet. App. 5a). Since the appellate jurisdiction of the courts of appeals under 28 U.S.C. 1291 is non-discretionary, we question whether this is a workable limitation on a defendant's right to interlocutory review. Indeed, the Fourth Circuit recently assumed jurisdiction over another pretrial appeal on speedy trial grounds due to the "exceptional circumstances of the case." See *United States* v. *Piluso*, No. 76–1274, motion to dismiss appeal denied, March 31, 1976. Moreover, even if the courts of appeals were empowered to refuse to hear an appeal that did not present an "extraordinary circumstance," substantial delay would still be occasioned by defendants' attempts to secure review while their trials are pending.

2. In holding that the speedy trial provision of the Sixth Amendment precludes a prosecution of respondent for the murder of his family, despite the fact that his trial was scheduled to begin less than seven months after his indictment, the court of appeals has seriously misconstrued this Court's decisions in *United States* v. *Marion, supra,* and *Dillingham* v. *United States,* 423 U.S. 64. What is more, by including in its speedy trial calculations the period from October 1970 to January 1975, during which time respondent was not under arrest, indictment, or any other legal disability, the court of appeals has taxed the government heavily for having conducted an exhaustive criminal investigation and for withholding charges until all avenues of inquiry, favorable as well as unfavorable to respondent, had been explored. If allowed to stand, this decision will have a substantial detrimental impact on the effective administration of the criminal laws.

a. In *United States* v. *Marion, supra,* and *Dillingham* v. *United States, supra,* this Court held that the right to a speedy trial guaranteed by the Sixth Amendment is activated only by the formal accusation of a crime, either by indictment, information, or arrest. As was explained in *Marion* (404 U.S. at 320):

> Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. * * * So viewed, it is readily

> understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.

See also 404 U.S. at 321 and n. 13. A necessary consequence of this rationale is that the right to a speedy trial is not implicated in the period after the charges against an accused have been dismissed and he has been released from custody. At that point, he no longer stands under public accusation or suffers interference with his liberties; necessarily, there can at that stage be no Sixth Amendment obligation upon the government to bring to trial expeditiously a person against who no criminal charges are outstanding.

The decision of the court of appeals erodes these heretofore settled principles. In calculating the delay underlying respondent's Sixth Amendment claim, the Fourth Circuit held that the right to a speedy trial had been triggered by respondent's military arrest in May 1970 [13] and had proceeded unabated until the date of his scheduled trial in August 1975—this despite the

[13] As Judge Craven's dissent indicates (Pet. App. 38a–40a), the court's threshold determination that respondent was arrested in May 1970, within the meaning of *Marion*, is not free from doubt. Although respondent's liberties were restricted, the military may of course impose restrictions upon its officers even in the absence of criminal charges. Cf. Art. 92 on the U.C.M.J., 10 U.S.C. 892. Furthermore, Col. Kane stated that he ordered respondent held in lieu of arrest (see Reh. App. 5–6), and respondent was never taken into custody but was allowed to engage in military duties and to take escorted and unescorted trips away from the reservation during the period of the Article 32 inquiry (Reh. App. 13–15). ("Reh. App." refers to the appendix to the government's petition for rehearing, with suggestion for rehearing *en banc*, in the court of appeals, a copy of which is being lodged with the Clerk of this Court.) We are not, however, seeking review of this issue, which essentially raises a factual question, and we therefore assume for purposes of this petition that respondent was arrested in May 1970.

> fact that the Army had dismissed all charges against him in October 1970, that respondent had been honorably discharged from the military two months thereafter, and that he had been free from "the actual restraints" imposed by his arrest or from any other legal disabilities during the next four years.

This result represents a marked departure from the standards outlined in *Marion;* it is a result that is contrary to the reasoning recently adopted by Congress in the Speedy Trial Act of 1974 (18 U.S.C. (Supp. IV) 3161(h)(6)) and by other legal authorities; [14] and it is a result that threatens a significant and wholly unjustified disruption in the enforcement of the criminal laws by requiring the government either to afford persons "not the subject of public accusation" (*United States* v. *Marion, supra,* 404 U.S. at 321) a speedy trial or to forego future prosecutions. Moreover, it is a result that is flatly inconsistent with

[14] See, *e.g.*, American Bar Association, *Standards Relating to Speedy Trial* §§ 2.2(b), 2.3(f) (App. draft 1968). Indeed, although the government conceded in its memorandum in *Dillingham* (No. 74–6738) that the court of appeals may have misapplied *Barker* v. *Wingo* by failing to consider the delay between the defendant's arrest and his indictment, we noted in addition (p. 7, n. 5): "Of course, if the complaint had been dismissed and petitioner had subsequently been indicted, the period between those two events, during which no charges were outstanding, would not be includable in the period of delay for purposes of the speedy trial analysis."

the view expressed by the District of Columbia Circuit in *United States* v. *Bishton,* 463 F. 2d 887. There, the defendant had been reindicted after the initial charges against him had been dismissed on jurisdictional grounds. In rejecting the claim that defendant's second prosecution violated his right to a speedy trial, the court declined to consider the period after the first prosecution had been terminated but before the second had begun (463 F. 2d at 891):

> While the record supplies no explanation for this delay, it is significant that during this time appellant was a free man against whom no prosecution was pending. The Supreme Court has recently held that the right to speedy trial attaches when a prosecution has begun, either by indictment or by the "actual restraints imposed by arrest." United States *v.* Marion, 404 U.S. 307, 320 * * *. While it is true that one prosecution for the offense began in April, 1969, that prosecution was finally terminated by the DCCA in April, 1970; and the rationale of *Marion,* although perhaps not applying with the same force, has relevance to the period between the end of one prosecution and the beginning of another, even when the two arise from the same occurrence. When a citizen stands neither arrested nor indicted for an offense, he "suffers no restraints on his liberty and is not the subject of public accusation; his situation does not compare with that of a defendant who has been arrested and held to answer." United States *v.* Marion, *supra,* at 321 * * *.

The decision below also conflicts with *United States* v. *Flores,* 501 F. 2d 1356, where the Second Circuit concluded that the delay in indicting a defendant after the complaint against him had been dismissed was irrelevant in assessing whether he had been denied his right to a speedy trial. 501 F. 2d at 1359–1360.[15]

The sole considerations offered by the court of appeals to support its anomalous result were that, during the period after the conclusion of the Army's investigation but prior to the return of the indictment, respondent remained under suspicion for the crime, was required by prudence to retain counsel for his continuing defense, and was subject to the anxiety of the threat of a prosecution (Pet. App. 17a). But precisely the same factors will concern an individual who, although not yet arrested or indicted, knows that he is the subject of a serious and lengthy criminal investigation; recognizing that, the Court in *Marion* nevertheless expressly declined to extend the Sixth Amendment's protections to that situation. 404 U.S. at 321.[16] If the

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[15] *Flores* involved an application of the district court's prompt disposition rules, rather than a direct holding on a constitutional speedy trial claims, as here. However, the purpose of those rules is to implement the Sixth Amendment's speedy trial requirement (cf. *United States* v. *Marion*, *supra*, 404 U.S. at 318–319 and n. 10), and it is plain that the analysis of the court in *Flores* is fully applicable to cases such as the instant case and would necessitate a result contrary to that reached by the court below.

[16] Indeed, the defendants in *Marion*, like respondent, had been aware of their status as criminal suspects well in advance of their formal indictment. See 404 U.S. at 309.

Nor is the court of appeals' conclusion supported by *Klopfer* v. *North Carolina*, 386 U.S. 213. As Judge Craven pointed out in

extension of the speedy trial provision, rejected in *Marion* as to persons under no formal accusation of crime, is to be applied to persons against whom all pending criminal charges have been dismissed, we submit that the innovation is of such fundamental importance that it should be announced by this Court alone.

b. The conclusion that respondent's rights under the Sixth Amendment have not been infringed does not mean that the five-year period of pre-indictment delay is beyond judicial scrutiny. As the Court noted in *United States* v. *Marion*, *supra*, 404 U.S. at 324, and as Judge Craven correctly observed in dissent (Pet. App. 40a–41a), the proper inquiry is one of due process under the Fifth Amendment. Specifically, this Court referred approvingly in *Marion* to the government's suggestion that the Due Process Clause would require the dismissal of an indictment "if it were shown at trial that the pre-indictment delay * * * caused substantial prejudice to * * * [the accused's right] to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused" (404 U.S. at 324; footnote omitted).

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dissent (Pet. App. 37a), the distinction that the majority acknowledged between this case and *Klopfer*—"there, an indictment remained potentially effective during the period of delay; here, MacDonald was not indicted until the end of the period" (*id.* at 18a)—was central to this Court's Sixth Amendment analysis in *Klopfer* (see 386 U.S. at 221–222) and was the crucial factor that brought that case within the rule announced in *Marion* for determining the applicability of the Sixth Amendment provision. See 404 U.S. at 320. Unlike respondent, Klopfer formally remained "the subject of public accusation" during the period of delay.

Although the court of appeals failed to undertake this analysis, the record reflects that respondent could not have sustained his burden under either branch of the *Marion* test. First, while we have previously argued that determinations of prejudice should not be attempted prior to trial,[17] this is not a case in which prejudice may properly be presumed. The government's case is composed primarily of physical evidence, scientific testimony, and the logical inferences to be drawn therefrom, none of which is impaired by the passage of time. Moreover, respondent's defense is dependent upon his own testimony rather than an alibi or the testimony of others, and he has never claimed an inability to recall events of the night in question. Indeed, respondent has presented essentially the same version of the events from his initial interview on February 17, 1970, to his appearances before the grand jury in 1974 and 1975. There are no missing or dead witnesses, and all prior statements in the case have been transcribed and preserved. To the extent that witnesses' memories may have weakened over time, this factor would affect the government as well as respondent—and the government must bear the burden of proving guilt beyond a reasonable doubt.

Nor, as the court of appeals acknowledged (Pet. App. 20a), was the delay here attributable to a deliberate attempt to hamper the defense. As we have previously noted, see pp. 9–10 *supra*, large portions of

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[17] A discussion of the dangers inherent in a pretrial resolution of the due process question is contained in the government's petition for a writ of certiorari in *United States* v. *Lovasco*, No. 75–1844, a copy of which is being furnished to counsel for respondent.

the five-year hiatus between the crimes and the indictment were spent in exhaustive investigations of the case and appraisals of the evidence by the C.I.D. and the Department of Justice. Additionally, the probative value of certain evidence obtained at the outset of the inquiry was not immediately apparent. For example, although respondent alleged that his pajama top had been ripped by his attackers in the living room of his quarters and that he had subsequently placed the garment atop his wife's body, it was not until July 1971 that the F.B.I. laboratory determined that respondent's wife's blood had stained the pajama top before it was torn. Similarly, not until three years later, in October 1974, did the F.B.I. discover that if Colette MacDonald's body were to be covered with respondent's pajama top in a certain manner, the puncture holes in the pajama would correspond precisely to the ice pick wounds sustained by her chest. See p. 5, n. 3, *supra*.

The Fourth Circuit correctly noted (Pet. App. 21a) that two years elapsed between the receipt of the C.I.D. report by the Department of Justice in 1972 and the initiation of grand jury proceedings in 1974. But the failure of the government to have proceeded with the dispatch deemed desirable, in retrospect, by the court of appeals does not render the pre-indictment delay here unreasonable. As we have explained in our petition in *Lovasco*, the preclusion of prosecution of a defendant whose guilt may be capable of establishment beyond a reasonable doubt is a grave step—one that should not be taken on the basis of judicial second-guessing of the quality of the investigation conducted

by the executive branch, but that can be justified only upon a showing that the delay in reaching a prosecutorial decision was fundamentally unfair and violated the defendant's right to due process of law. This Court noted in *United States* v. *Ewell*, *supra*, 383 U.S. at 122, that "the applicable statute of limitations * * * is * * * the primary guarantee against bringing overly stale criminal charges." The decision of Congress that an indictment for first-degree murder may be brought at any time (18 U.S.C. 3281) reflects the view that society's interest in convicting the perpetrator of that offense is so substantial that prosecution is to be permitted regardless of the passage of time. Since the pre-indictment delay in this case did not violate the Fifth Amendment, the court of appeals' inquiry should have ended and this case should have proceeded to trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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